

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

FOSTILL LAKE BUILDERS, LLC,

Appellant,

v.

TUDOR INSURANCE COMPANY,

Respondent,

and

H DESIGN CONSTRUCTION, LLC,

Respondent-Appellant.

DOCKET NUMBER WD72582
(Consolidated with WD72594)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: March 29, 2011

APPEAL FROM

The Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

JUDGES

Division II: Mitchell, P.J., and Ellis and Howard, JJ.

CONCURRING.

ATTORNEYS

Michael G. Berry and Marshall V. Wilson
Jefferson City, MO

Attorneys for Appellant,

John M. Waldeck, Brian T. Goldstein and Christopher J. Zarda
Leawood, KS

Attorneys for Respondent,

Andrew K. Bennett
Springfield, MO

Attorney for Respondent-Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

FOSTILL LAKE BUILDERS, LLC,)	
)	
Appellant,)	
v.)	
)	
TUDOR INSURANCE COMPANY,)	OPINION FILED:
)	March 29, 2011
Respondent,)	
and)	
)	
H DESIGN CONSTRUCTION, LLC,)	
)	
Respondent-Appellant.)	

WD72582 (Consolidated with WD72594)

Cole County

Before Division II Judges:

Karen King Mitchell, Presiding Judge, and
Joseph M. Ellis and Victor C. Howard, Judges

Fostill Lake Builders, LLC (“Fostill”) and H Design Group, LLC (“H Design”) appeal the amended judgment of the Circuit Court of Cole County, Missouri (“trial court”) granting summary judgment to Tudor Insurance Company (“Tudor”) on Fostill’s equitable garnishment action against an insurance policy issued by Tudor to H Design and dismissing H Design’s action for defense costs. On appeal, Fostill alleges that the trial court erroneously determined that a federal court issuing the underlying judgment against H Design lacked subject matter jurisdiction over Fostill’s professional negligence claim against H Design because such claims were preempted by the FHA and the ADA. Fostill also claims that the trial court erred in finding the federal judgment to have been unreasonable based upon its view that the judgment was rendered without subject matter jurisdiction, and in finding that Fostill’s claim against H Design was expressly excluded from coverage under the Tudor policy at issue. H Design claims that the trial court erroneously dismissed its claims against Tudor to recover the costs it expended in defending the suits against it, as Tudor had a duty to defend H Design under the policy.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DIVISION TWO HOLDS:

While preemption of state claims by federal law may sometimes divest a court of subject matter jurisdiction, such was not the case here. Preemption of a state-law professional negligence claim by the ADA or FHA would be a matter of conflict or obstacle preemption, which does not deprive a court of jurisdiction, but merely serves as an affirmative defense to the state-law claim. As an affirmative defense, it may be waived if not pleaded. Neither H Design nor Tudor timely pleaded the affirmative defense of conflict preemption, so the federal court properly exercised supplemental jurisdiction over the state-law negligence claim, the judgment was within the federal court's subject matter jurisdiction, and the trial court's judgment stating otherwise was erroneous. Because the trial court's finding that the judgment for Fostill was unreasonable was based primarily on this erroneous conclusion that it was jurisdictionally deficient, the finding of unreasonableness was also in error.

While the professional liability policy at issue in this case specifically excluded coverage for claims of discrimination against H Design, the trial court erroneously concluded that Fostill's claims against H Design fell under this exclusion. The plain meaning of the term discrimination indicates a purpose to discriminate, and not merely a negligent failure to comply with building codes that relate to accessibility for disabled individuals. At the least, the term in the exclusionary clause is ambiguous, and ambiguity is construed against the insurer.

The trial court also erred in dismissing H Design's claims against Tudor. Tudor had a duty to defend H Design against the claims brought by Fostill since they were not expressly excluded by the terms of the policy. Furthermore, since the duty to defend is more broad than the duty to indemnify, and Tudor did not establish that there was no possibility that the claims brought against H Design by the original plaintiffs in the underlying lawsuits had merit, Tudor had a duty to defend H Design on those claims as well.

OPINION BY: Karen King Mitchell, Presiding Judge

March 29, 2011

* * * * *

THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.